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IN THE

Supreme Court of the United States

October Term, 1965

No. 581

MIRIAM J. WOLF,

Petitioner,

v.

CLAY BLAIR, JR., MATTHEW J. CULLIGAN, MILTON S. GOULD, MARVIN D. CANTOR and THE CURTIS PUBLISHING COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 21, 1965.

Opinions Below

No opinion was rendered by the District Court. The opinion of the Court of Appeals, per Friendly, Circuit Judge, is not yet officially reported. It is reprinted as an Appendix to this petition. The concurring opinion of Circuit Judge Waterman follows in the same Appendix.

Jurisdiction

The judgment of the Court of Appeals was entered on June 21, 1965.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Does Federal Rules of Civil Procedure Rule 23(c) empower the District Court to enjoin settlement by a corporation and its officers of claims which are involved in a stockholder's derivative action in the federal court, challenging the arrangements between them, except upon notice to all stockholders and subject to court approval?

2. Does the pendency in a federal court of a stockholder's derivative action challenging arrangements between a corporation and its officers deprive the corporation and the officers involved of power to make an out-of-court settlement—without notice to all stockholders and court approval as required by F. R. C. P. Rule 23(c)?

Statutes Involved

Rule 23 of the Federal Rules of Civil Procedure provides as follows:

> "RULE 23. *Class Actions*
>
> (a) *Representation.* If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce

that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

(b) *Secondary Action by Shareholders.* In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

(c) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it."

Statement

In May, 1964, petitioner, Miriam J. Wolf, a stockholder of Curtis Publishing Company, brought a stockholder's derivative action in the District Court for the Southern District of New York against the Company and various individuals (the respondents, among them) who were directors, officers or both, of the Company, at relevant dates.

In support of federal jurisdiction, the complaint alleged violations of Section 14a of the Act of 1934 (15 U. S. C. § 78(n)(a) and Securities and Exchange Commission Rules 14a-3, 14a-9 (17 CFR 240.3, 240.14a-9). Jurisdiction was alleged to exist under Section 27 of the Securities Exchange Act (15 U. S. C. § 78aa) and Sections 1331 and 1337 of the Judicial Code (28 U. S. C. §§ 1331, 1337). The doctrine of pendent jurisdiction was relied upon to bring further wrongdoing before the Court.

The complaint alleged, *inter alia,* that in 1962 Curtis had employed defendants Culligan and Clifford, Culligan being elected President and Clifford Executive Vice President; that their employment agreements contained common stock options which (save for 15,500 shares in Culligan's case) were contingent upon approval of an increase in Curtis' authorized common stock; that the proxy statement for the 1963 annual meeting of stockholders, at which the management sought approval for such an increase primarily to meet the requirements of these contracts and of a general Restricted Stock Option Incentive Plan, was false and misleading in various respects; that the proposal to increase the authorized common stock did not receive a two-thirds vote of the prior preferred stock although this was required; that ratification of the Restricted Stock Option Incentive Plan was unlawfully obtained because of the lack of separate approval of the additional common stock by the prior preferred; that the grant of stock options to Culligan and Clifford and to the defendant Kantor was wrongful in other

respects; that an increase in Culligan's salary agreed to in 1963 constituted a waste of corporate assets; and that the proxy statement had concealed facts the defendants knew or should have known as to the value of mineral rights in Canadian timberlands owned by a subsidiary of Curtis which would result in an increase in the value of Curtis' stock unrelated to any efforts of Culligan, Clifford or other recipients of stock options. Demand upon the directors to sue was alleged to be futile because of their participation in the transactions complained of and their consequent liability; demand upon the stockholders was claimed to be unnecessary and futile. The complaint prayed that the actions taken at the 1963 annual meeting be annulled; that Culligan's, Clifford's and Kantor's stock options be cancelled; that the Restricted Stock Option Incentive Plan and all options thereunder be rescinded; that holders of options surrender any stock obtained by the exercise of options and account for any profits; and that the directors be held liable for any damage suffered by Curtis as a result of the acts alleged.

Various extensions of the time to answer were obtained. The stipulation covering the period from November 3 to November 16, 1964 was given after Curtis promised petitioner's attorneys not to enter into any agreements with executives or employees settling claims under any of the employment agreements referred to in the complaint. When Curtis and other defendants refused to renew this undertaking and a newspaper article indicated that Curtis was about to make settlements with four defendant-employees who had resigned, petitioner moved for an order enjoining any compromise or settlement of claims in favor of Curtis asserted in the complaint save with the approval of the District Court on notice to all stockholders, as provided in FRCP 23(c). Judge Palmieri denied the motion without opinion, and petitioner appealed, 28 U. S. C. §1292(a)(1).

The Court of Appeals for the Second Circuit affirmed although it recognized that the petitioner's contention "is

interesting and by no means without force" and "not one to be lightly overruled". The court held that "the corporation's power to make its own out-of-court settlements, subject to normal shareholder redress, is not abolished by a procedural rule [FRCP, 23(c)] that does not embrace these either in its language or in its primary rationale" (App., p. 7a).

Reasons for Granting the Writ

In narrowly construing FRCP Rule 23(c) to exclude from its reach and ambit corporate out-of-court settlements of claims involved in a derivative stockholder's action, the Court of Appeals has decided an important federal question, in a manner inconsistent with the history and objectives of Rule 23. It represents a decision on an important question of federal law, of first impression, which has not been, but should be, settled by this Court. (Cf. *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 7 (1941).

It would appear to be self-evident as a rule of equity, that the restraints and mandate of Rule 23(c) should apply equally to the stockholder-plaintiff suing in the corporation's behalf in a derivative action and to the corporation and the individual culpable defendants.

Without reviewing the history and objectives of Rule 23, the Court of Appeals doubted whether the authority conferred on this Court by 28 U. S. C. § 2072 would support a rule invalidating an out-of-court settlement by a corporation "simply because it was a defendant in a federal court derivative action". The Court hesitated to construe "Rule 23(c) in a manner that would raise questions on this score, when neither the language nor the evident purpose compels".

We submit that this is a narrow and conservative construction of a rule embodying ancient equitable principles

which have been recognized since *Hawes* v. *Oakland,* 104 U. S. 450, decided by this Court in 1881. Following that decision, this Court at the same Term adopted Equity Rule 94, which later was re-enacted as Equity Rule 27 and is now embodied in Rule 23. Rule 23(c) was added in 1938 to complete the "safeguards" and the protection which equity accorded to the derivative claim which the corporation would not, in the first instance, prosecute against one or more members of the management team (culpable officers and directors).

Both opinions in the Court of Appeals acknowledge the inherent power of a court of equity under "the general equity powers of the court" to supervise or to control management's conduct, in certain circumstances, but it is said that this Court did not, in exercising its equity-rule-making powers, include this control in enacting Rule 23(c). This approach discredits the whole history of the Rule.

The late Charles E. Clark, Chief Judge of the Second Circuit Court of Appeals (who was the Reporter to this Court's Advisory Committee on the 1938 revision of the Federal Rules of Civil Procedure) then considered Rule 23 as "an ancient rule of equity"; that it was "not designed to state new principles but really to state the old equitable principle of class suits in a way which adds clarity and will make it more usable * * *".

In discussing Rule 23(b) at the American Bar Association Institute on the Federal Rules, in 1938, Judge Clark declared:

> "There might be possibly a little question had that rule been something newly adopted, whether it was not at least on the verge of being a rule of substantive law, but since it is an ancient ruling of the Court's own, it seemed to us that clearly it should be included here as it has been in the equity procedure for so many years."

The Court of Appeals recognized that while the District Court could under certain circumstances take protective procedures to prevent corporate action under its "General Equity Powers" (App., p. 9a), it could not do so "in response to a supposed universal command of Rule 23(c)".

But if the thrust of Rule 23 had been "to state old equitable principles", then implicit in its sweep and coming under its protective umbrella is the safeguard of "no compromise" by, or for, the corporation without court approval under Rule 23(c).

At the Institute Conference in 1938, Judge Clark, in answer to an inquiry, stated that stockholders' actions were intended to be included within the ambit of Rule 23(c), although its provisions "are made general". He referred to the Committee's note to subdivision (c) and its reference to the article by McLaughlin in 46 Yale L. J. 421 (1937).

It is true that while the article itself was entitled "Capacity of Plaintiff-Stockholder to Terminate a Stockholders' Suit", nevertheless, it proposed that "the approval of the proposed settlement might be left to the discretion of the court" (op. cit. pp. 433-34) which would examine into the bona fides of the corporate representatives "in proposing to enter into the compromise for the corporation." Thus, the author stated:

> " • • • That in a non-derivative suit all parties enter into a compromise uninfluenced by factors other than the merits of the compromise, whereas in a derivative action, there is the probability that one of the parties, the corporation, is dominated by the defendants is offset by the added element of judicial supervision. For, two courses of action are open to the court, either of which insure adequate protection of all the interests involved. It may inquire and decide whether, in proposing to enter into the compromise for the corporation, the directors are acting oppressively or fraudulently, or as proper corporate representatives without self-interest. And if the latter be determined, the court need inquire no

> further into the merits of the settlement; the corporation is then as free to act as if it had been the original plaintiff. If, however, the court has doubts as to the openmindedness of the directors, it may disregard entirely the assent of the corporation, and, after examining all the circumstances, reach an independent decision on the fairness of the settlement."

It is difficult to understand the rationale of the Court of Appeals in denying the protection of the Court's intervention under Rule 23(c) to a plaintiff and the other stockholders, who are not consulted by the corporation in effecting an out-of-court settlement of claims with its culpable representatives, whereas if the plaintiff were submitting the settlement, Rule 23(c) is invoked and permits the District Court "to inquire and decide whether, in proposing to enter into the compromise for the corporation, the directors are acting oppressively or fraudulently, or as proper corporate representatives without self-interest". It just doesn't make sense to require the stockholders to bring a new action to reach the out-of-court corporate settlement. That the Court of Appeals did entertain serious doubts as to the certainty of its approach may be inferred from its comments on the cases cited by petitioner and discussed by the Court (at App., pp. 8a-9a). The court said:

> "Of course, the corporation and a defendant have much to gain by having their settlement approved by the court under rule 23(c). After a judicial finding that the settlement is just, following full disclosure and opportunity for stockholders to contest, it will not be easy later to attack the settlement and show that its signers abandoned corporate claims through neglect or self-dealing. But the cases permitting the corporation to comply with the rule and settle in the framework of the derivative action do not make unavailable the out-of-court route, with all its hazards, if the corporation elects to pursue this.
>
> What we have written should not be taken as saying that there can never be circumstances under which a federal court, seized of a stockholder's suit,

> could properly enjoin the corporation, temporarily or finally, from entering into a settlement of a claim for improper dealings with it. . . ."

We submit that the power of the District Court to take the action sought below flows from the equity powers of the court which have been partially imbedded in Rule 23(c).

The Court of Appeals did not question the power of the Court to enact Rule 23(c). It did question the reach of the Rule. While it is true that under the enabling Act of 1934 (the substance of which is now provided in 28 U. S. C. § 2072), this Court may "not abridge, enlarge or modify any substantive right," nevertheless, Rule 23 in all of its parts is merely a formulation of the previous practice authorized by this Court, certainly since its decision in *Hawes* v. *Oakland, supra,* in 1881. As Mr. Justice Brandeis had occasion to say in *Washington-Southern Nav. Co.* v. *Baltimore & P. S. Co.,* 263 U. S. 629, 635 (1924):

> "Occasionally, a rule is employed to express, in convenient form, as applicable to certain classes of cases, a principle of substantive law which has been established by statute or decisions".

This view was reflected by Judge Clark in the comment to which we have earlier adverted (*supra,* p. 7), to wit, that the basic substance of Rule 23 "is an ancient ruling of the Court's own". It had been in the equity procedure for so many years that it seemed to the Advisory Committee that "clearly it should be included in the Federal Rules." *

Rule 23(c) as sought to be applied effects no change in substantive law but deals rather with "the judicial process

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* While the Court's Advisory Committee on Civil Rules proposed substantial amendments to the Rules of Civil Procedure in 1964 in connection with class actions, it left substantially unchanged the provisions applying to derivative actions by shareholders and especially as to compromises, except to place these provisions in a separately numbered Rule 23.1 (34 FRD 395).

for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them'' (*Sibbach* v. *Wilson & Co., Inc., supra,* at p. 14).

If Rule 23(c) were to be construed narrowly, then an unwarranted dichotomy in the application of the Rule would result: The plaintiff stockholder could not settle the corporation's claim against culpable officers and directors even with the consent of the corporation without judicial intervention and upon notice to stockholders, but the corporation itself could settle such claims out-of-court, free of such requirements.

There is nothing in the Rule which requires such a differentiation.

Since this Court has recognized the stockholder's derivative action as an effective enforcement demedy (*cf. J. I. Case Co.* v. *Borak,* 377 U. S. 426 [1964]), its usefulness should not be diluted by permitting corporate management to bypass the limitations and restraints imposed by Rule 23(c). To that end, this Court should review the decision below and accord to Rule 23(c) the effectiveness which, we contend, it was intended to have.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

September 15, 1965.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit

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No. 434—September Term, 1964.

(Argued April 8, 1965 Decided June 21, 1965.)

Docket No. 29488

MIRIAM J. WOLF,

Plaintiff-Appellant,

v.

CURTIS BARKES, CLAY BLAIR, JR., CARY W. BOK, MOREAU D. BROWN, ELLSWORTH BUNKER, JOHN M. CLIFFORD, MATTHEW J. CULLIGAN, WALTER S. FRANKLIN, WALTER D. FULLER, MILTON S. GOULD, MARVIN D. KANTOR, M. ALBERT LINTON, HARRY C. MILLS, MARTY CURTIS ZIMBALIST, C. L. MACNELLY and THE CURTIS PUBLISHING COMPANY,

Defendants-Appellees.

Before:

WATERMAN, FRIENDLY and ANDERSON,

Circuit Judges.

Appeal by plaintiff in a stockholder's derivative action in the District Court for the Southern District of New York from an order, Edmund L. Palmieri, *Judge,* denying her application for an injunction restraining the defendants from compromising or settling the claims alleged in the complaint save in compliance with F. R. Civ. P. 23(c). Affirmed.

Appendix—Opinion of the United States Court of Appeals for the Second Circuit

PAUL L. ROSS (Wolf Popper Ross Wolf & Jones, New York, New York; Henry H. Wolf, of Counsel), *for Appellant.*

PETER P. KENNY (Bernard Buchwald, New York, New York), *for Appellees Kantor and Blair.*

ARNOLD G. FRAIMAN (Dewey, Ballantine, Bushby, Palmer & Wood, New York, New York; Edward N. Sherry, of Counsel), *for Appellee The Curtis Publishing Company.*

DAVID R. HYDE (Cahill, Gordon, Reindel & Ohl, New York, New York), *for Appellees Culligan and Mills.*

FRIENDLY, *Circuit Judge*:

Appellant's contention is that the pendency in a federal court of a stockholder's derivative action challenging arrangements between a corporation and its officers deprives the corporation and officers of power to make any out-of-court settlement—that is, one not requiring action by the court in the derivative suit—and that once the suit has been brought, there must be notice to stockholders and court approval as provided in F. R. Civ. P. 23(c), even though the settlement itself calls for no judicial action. Although the contention is interesting and by no means without force, we think the rule does not go that far.

In May, 1964, plaintiff Miriam J. Wolf, a stockholder of Curtis Publishing Company, brought an action in the District Court for the Southern District of New York against the Company and various individuals, who were said to have been directors, officers, or both, at relevant dates. In support of federal jurisdiction the complaint alleged violation of § 14a of the Securities Exchange Act, see § 27; and

the doctrine of pendant jurisdiction was relied upon to bring further alleged wrongdoing before the [district] court. The complaint alleged, *inter alia*, that in 1962 Curtis had employed defendants Culligan and Clifford, Culligan being elected President and Clifford Executive Vice-President; that their employment agreements contained common stock options which (save for 15,500 shares in Culligan's case) were contingent upon approval of an increase in Curtis' authorized common stock; that the proxy statement for the 1963 annual meeting of stockholders, at which the management sought approval for such an increase primarily to meet the requirements of these contracts and of a general Restricted Stock Option Incentive Plan, was false and misleading in various respects; that the proposal to increase the authorized common stock did not receive a two-thirds vote of the prior preferred stock although this was required; that ratification of the Restricted Stock Option Incentive Plan was unlawfully obtained because of the lack of separate approval of the additional common stock by the proir preferred; that the grant of stock options to Culligan and Clifford and to the defendant Kantor was wrongful in other respects; that an increase in Culligan's salary agreed to in 1963 constituted a waste of corporate assets; and that the proxy statement had concealed facts the defendants knew or should have known as to the value of mineral rights in Canadian timberlands owned by a subsidiary of Curtis which would result in an increase in the value of Curtis' stock unrelated to any efforts of Culligan, Clifford or other recipients of stock options. Demand upon the directors to sue was alleged to be futile because of their participation in the transactions complained of and their consequent liability; demand upon the stockholders was claimed to be unnecessary and futile. The complaint prayed that the actions taken at the 1963 annual meeting be annulled; that Culligan's, Clifford's and Kantor's stock op-

tions be cancelled; that the Restricted Stock Option Incentive Plan and all options thereunder be rescinded; that holders of options surrender any stock obtained by the exercise of options and account for any profits; and that the directors be held liable for any damage suffered by Curtis as a result of the acts alleged.

Various extensions of the time to answer were obtained. The stipulation covering the period from November 3 to November 16, 1964, was given after Curtis promised plaintiff's attorneys not to enter into any agreements with executives or employees settling claims under any of the employment agreements referred to in the complaint. When Curtis and other defendants refused to renew this undertaking and a newspaper article indicated that Curtis was about to make settlements with four defendant-employees who had resigned,[1] plaintiff moved for an order enjoining any compromise or settlement of claims in favor of Curtis asserted in the complaint save with the approval of the district court on notice to all stockholders, as provided in F. R. Civ. P. 23(c). Judge Palmieri denied the motion without opinion, and plaintiff appealed, 28 U. S. C. §1292(a)(1).

Rule 23(c) provides that "a class action shall not be dismissed or compromised without the approval of the court," and also requires that when such an action seeks to enforce a right defined in rule 23(a)(1), as the instant one did, "notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." There can be little doubt that if we look only at the letter of the rule, it does not apply. No one has sought to dismiss or compromise the class suit. Cf. *Webster Eisenlohr, Inc.* v. *Kalodner*, 145 F. 2d 316, 320 (3 Cir. 1944), cert. denied, 325 U. S. 867 (1945). If we go

[1] Two of these, Kantor and Blair, had brought an action for breach of contract against Curtis in the New York Supreme Court.

behind the letter to the prime "mischief and defect" the rule was intended to prevent, to wit, "private settlements under which the plaintiff stockholder and his attorney got the sums paid in settlement, and the corporation got nothing," *Craftsman Finance & Mortgage Co.* v. *Brown*, 64 F. Supp. 168, 178 (S. D. N. Y. 1945),[2] the instant case likewise is not within it. But plaintiff insists it to be anomalous that although she could not compromise the suit without complying with rule 23(c), the corporation should have what she considers to be a greater liberty, and contends that various decisions point in her favor.

The plaintiff argues that a settlement by the corporation with the officers will give them a presumptively valid defense to the claims now being pressed in the derivative suit; and that if the settlement includes a general release, see fn. 5, this may extinguish the corporation's claims against the defendants, not only as recipients of corporate property but also as directors, as neatly as if a derivative plaintiff had dismissed his own suit secretly or after the statute of limitations had run, or if an unfavorable consent judgment had been rendered—schemes against which rule 23(c) was clearly directed. But the situations differ in many important respects.

In the hypothesized cases, the court's own process is being used to obtain a determination which, in one way or another, will bind or prejudice the class on whose behalf the suit was brought. To guard against this is an obviously proper subject for rule-making. There would be ground for doubt whether the authority conferred on the Supreme

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[2] That this was the objective is indicated by the Advisory Committee's citation of McLaughlin, Capacity of a Plaintiff-Stockholder to Terminate a Stockholder's Suit, 46 Yale L. J. 421, 430 (1936). See also Note, Control over Settlement of Shareholder's Suits, 54 Harv. L. Rev. 833 (1941); 2 Hornstein, Corporation Law and Practice § 727 (1959).

Court by 28 U. S. C. § 2072 would support a rule invalidating an out-of-court settlement by a corporation simply because it was a defendant in a federal court derivative action. The "great vigilance" exercised by the Supreme Court and its Advisory Committee "in observing the prohibition in the rule-making statute against abridging, enlarging, or modifying the substantive rights of any litigant," 3 Moore, Federal Practice ¶ 1.04[1], at 26 (2d ed. 1964), argues against construing rule 23(c) in a manner that would raise question on this score, when neither the language nor the evident purpose compels.

From a practical standpoint also there are important differences between the hypothesized cases and that here before us. While a board of directors dominated by the defendants with whom settlements are made would find it hard to provide a release that would survive charges of self-dealing, dismissal or compromise by an independent stockholder, with the corporation simply standing idle, would not be subject to such easy attack. A new derivative suit against management for fraud or waste in releasing corporate claims for inadequate payment can redress improper settlements even without setting them aside; finding a management target when the derivative shareholder has terminated the corporate claim may be a harder assignment. When the acquiescence of a derivative plaintiff to a dismissal or a consent judgment has in effect been purchased by the defendants, the supposed vigorous champion of the shareholders at large has been retired; far from policing the disposition of the corporate claim, he may well assist in seeing that the news does not leak out to stir other shareholders to inquiry. No such silencing of the derivative plaintiff occurs when the corporation settles out of court with some of the defendants. Indeed, he is the very person most likely to challenge the settlement, either

by pursuing the original action and attempting to overthrow the settlement or by bringing a new action against the directors in which the settlement itself is the gravamen of the complaint.

No one would contend that a corporation could not negotiate a release of corporate claims, even against insiders, before a derivative suit was started. The corporation's interest in achieving a favorable settlement does not cease because derivative litigation has begun; especially is this so when some of the defendants in the derivative suit have taken the initiative—as the present case—in bringing their own actions against the corporation and settlement with them may be impossible unless it can be promptly consummated.

It is true that the commencement of a derivative suit provides a handle for judicial supervision not present when the corporation negotiates at an earlier stage, and that permitting out-of-court settlements may be discouraging to attorneys for derivative plaintiffs.[3] It is also true that some suspicion may attach to a settlement made by a board of directors that has shown no inclination to collect corporate claims until its hand is forced by the start of a derivative suit. But though the plaintiff's argument is not one to be lightly overruled, we conclude that the corporation's power to make its own out-of-court settlements, subject to normal shareholder redress, is not abolished by a procedural rule that does not embrace these either in its language or in its primary rationale. Whether it would not be well to expand the principle of rule 23(c) to cover

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[3] Whether a derivative plaintiff's attorney might not be entitled to some compensation if he could show that the suit was in some degree responsible for the settlement is another matter. Compare *Gilson* v. *Chock Full O'Nuts Corp.*, 331 F. 2d 107 (2 Cir. 1964). Any out-of-court payment by the corporation to such an attorney would be subject to the principle laid down in *Certain-Teed Prods. Corp.* v. *Topping*, 171 F. 2d 241, 243-44 (2 Cir. 1948).

a case like that here presented, and how that can be lawfully done, are not here before us.[4]

The authorities cited by plaintiff do not have the reach she attributes to them. This court's decision in *Certain-Teed Prods. Corp.* v. *Topping,* 171 F. 2d 241 (2 Cir. 1948), was simply that a sum paid to the attorney for a stockholder plaintiff in a derivative suit in a district court, without the court's knowledge, in consideration for his consenting to the grant of a defendant's motion for summary judgment, could be recouped to the extent it exceeded a reasonable attorney's fee. In *Denicke* v. *Anglo California Nat'l Bank,* 141 F. 2d 285 (9 Cir.), cert. denied, 323 U. S. 739 (1944), the corporation, which had come under new management, sought and obtained approval of a compromise under rule 23(c); so far as the case has any pertinence, this is only for its implicit holding that when a derivative suit is compromised in a district court, rule 23(c) must be complied with although the settlement has been instigated not by the derivative plaintiff but by the corporation acting under an independent board of directors. The same implicit holding appears in *Birnbaum* v. *Birrell,* 17 F. R. D. 409 (S. D. N. Y. 1955). Of course, the corporation and a defendant have much to gain by having their settlement approved by the court under rule 23(c). After a judicial finding that the settlement is just, following full disclosure and opportunity for stockholders to contest, it will not be easy later to attack the settlement and show that its signers abandoned corporate claims through

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[4] The SEC urged Congress to provide in the Investment Company Act of 1940 that such companies be forced to seek court approval before settling claims against "insiders" that could be the target of derivative suits; the provision was not enacted. See Note, *supra* note 2, 54 Harv. L. Rev. at 835-36. Compare *Alleghany Corp.* v. *Kirby,* 333 F. 2d 327, 347 (2 Cir. 1964) (dissenting opinion).

neglect or self-dealing. But the cases permitting the corporation to comply with the rule and settle in the framework of the derivative action do not make unavailable the out-of-court route, with all its hazards, if the corporation elects to pursue this.

What we have written should not be taken as saying that there can never be circumstances under which a federal court, seized of a stockholder's suit, could properly enjoin the corporation, temporarily or finally, from entering into a settlement of a claim for improper dealings with it. We cite, simply by way of illustrating what we have in mind, a case where the beneficiaries of the alleged improper dealing still dominated the board of directors and plaintiffs were able to make some proof that wrongdoing was afoot. But any such action would be taken under the general equity powers of the court—as to which we find ourselves in a considerable measure of agreement with the dissenting opinion of Judge Biggs in *Webster Eisenlohr, supra,* 145 F. 2d at 322-24—and on the facts of the particular case, not in response to a supposed universal command of rule 23(c). The papers here presented to the district judge not merely did not compel but would hardly have justified the taking of such action.[5]

Affirmed.

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[5] We gather from the extracts from the 1965 proxy statement quoted in appellant's reply brief that "settlements" have been made with three former directors, Culligan, Blair and Kantor. Blair and Kantor had left the Company's employ on October 30, 1964, and all options held by them have been ended without being exercised. Culligans' employment contract has been terminated as of Jan. 16, 1966, although valuable rights under the contract continue thereafter. The only moneys moving from the Company, other than compensation continuing to be paid Culligan under his contract, were $75,000 to Kantor and $78,600 to Blair, who had asserted claims approximating $550,000. It does not appear from the proxy statement, or from any other material before us, whether any general releases were executed.

WATERMAN, *Circuit Judge* (concurring):

Reluctantly persuaded by the convincing language of my brother Friendly, I concur in the result my colleagues here reach. I am of the belief that it would have been better judicial administration for the learned judge below to have granted a preliminary injunction restraining the corporation from settling, compromising, or issuing releases. Thereby there would have been preserved for all the parties the situation plaintiff was complaining of until final resolution of plaintiff's claims on their merits. Nevertheless, I am persuaded that the unwillingness of the district court to employ the resources available to it within well recognized equity jurisdiction principles is not unreasonable in view of the likelihood that any releases the corporation may have issued will be suspect, the beneficiaries of the compromises made with the corporation will probably remain solvent and will themselves, in the event plaintiff finally substantiates her case, be subject to account to the corporation in whose interest plaintiff has commenced her action.

Moreover, I agree that the language of Rule 23(c), the Rule upon which plaintiff bottomed her motion, does not specifically direct that the trial judge grant the preserving injunction plaintiff requested.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 581

MIRIAM J. WOLF,

Petitioner,

v.

CLAY BLAIR, JR., MATTHEW J. CULLIGAN, MILTON S. GOULD, MARVIN D. KANTOR and THE CURTIS PUBLISHING COMPANY,

Respondents.

BRIEF FOR RESPONDENT, THE CURTIS PUBLISHING COMPANY, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF FOR RESPONDENT, THE CURTIS PUBLISHING COMPANY, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

This brief is respectfully submitted in behalf of Respondent, The Curtis Publishing Company ("Curtis"), in opposition to the petition of Miriam J. Wolf for a writ of certiorari to review a judgment of the Court of Appeals for the Second Circuit entered in the above cause.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1965. The petition attempts to invoke this Court's jurisdiction under 28 U. S. C. § 1254(1). Curtis submits,

however, that this Court is without jurisdiction to review the judgment of the court below on the ground that the issues raised by the petition are moot, as will be more fully discussed below.

QUESTIONS PRESENTED

Petitioner seeks review of the denial of her motion to enjoin Curtis from settling controversies with certain of its officers, with respect to employment contracts referred to in the Complaint, without notice to shareholders and court approval. Following the District Court's denial of the motion, Curtis negotiated settlements with respect to two of those contracts. The controversies which were settled were not the subject matter of either cause of action in Petitioner's complaint. With respect to the remaining contracts there is no showing that any controversy exists or is threatened. Thus, the questions presented are:

1. Does the absence of any showing that a controversy exists, or is threatened, with respect to any employment contracts referred to in the Complaint render moot the issues raised by Petitioner's motion and thereby deprive this Court of jurisdiction to decide those issues?

2. Does Rule 23(c) of the Federal Rules of Civil Procedure require a corporation named as a defendant in a stockholder's derivative action to submit to the District Court for its approval the settlement of individual employment contract claims which are not derivative in nature and to which neither the plaintiff in the derivative action nor any other stockholder is a party?

3. Is Petitioner entitled to injunctive relief in the absence of any showing of irreparable harm?

STATEMENT

Petitioner seeks review of the unanimous decision of the Court of Appeals for the Second Circuit affirming an order entered by the Hon. Edmund J. Palmieri, District Judge, on December 16, 1964. After oral argument and without opinion, Judge Palmieri denied from the bench Petitioner's motion to require Curtis to submit any proposed compromises or settlements of any demands made under employment contracts referred to in the Complaint to the District Court for its consideration and approval, upon notice to all stockholders.

Petitioner's motion was made in a derivative action which she brought as a stockholder of Curtis allegedly for the benefit of Curtis and on behalf of all other stockholders. The named defendants are Curtis and certain of its former and present officers and directors.

Following the decision of the Court of Appeals, and prior to filing this petition, Petitioner filed an Amended and Supplemental Complaint. The original Complaint, which is pertinent here, alleged two causes of action which can be summarized briefly as follows:

In the first cause of action, Petitioner contended that the salary provisions in the employment contracts of Respondents Matthew J. Culligan, former President and Chairman of the Board, and John M. Clifford, former Executive Vice President and now President, and certain stock options given them thereunder, resulted in excessive and unreasonable compensation to them and were a waste of corporate assets. It was also alleged that the proxy statement for the April, 1963 annual meeting of Curtis contained false and misleading statements concerning such contracts and a proposed employee stock option incentive plan and that the proxy statement represented that no stock options would be

granted to Respondent Marvin D. Kantor and that options were in fact granted to him. Finally, it was alleged that at the annual meeting in 1963, a proposal to increase the authorized shares of common stock, needed to satisfy the stock options given to Messrs. Culligan and Clifford and to be given under the stock option plan, was not properly voted on.

In the second cause of action, Petitioner alleged that the directors of Curtis had information concerning mineral discoveries on certain lands owned by a Curtis subsidiary in Canada, and that this information was omitted from the 1963 proxy statement with the result that, when the mineral discoveries were made public after the annual meeting in April, 1963, the stock options given constituted a windfall to the recipients.

Since the commencement of this action on June 1, 1964, but not as a result of any of the allegations contained in the Complaint, Curtis has made a number of changes in its management personnel. These included the resignation of Mr. Culligan, first as President, and subsequently as Chairman of the Board, the promotion of Mr. Clifford to the post of President from Executive Vice President, and the termination of the employment of Respondents Clay Blair, Jr. and Kantor as Senior Vice Presidents.

Following the termination of their employment, Messrs. Blair and Kantor commenced an action against Curtis in the Supreme Court of the State of New York, New York County, for breach of their employment contracts. That action has since been settled by an agreement between the parties thereto. See *Wolf* v. *Barkes,* 348 F. 2d 994, 998 fn. 5 (2d Cir. 1965). Curtis also gave notice to Mr. Culligan that it would terminate his employment contract on January 16, 1966, although valuable rights under his contract were to continue thereafter. *Ibid.* No controversy exists regarding Mr. Clifford's employment contract.

Clearly, the action taken with respect to the employment contracts of these three officers in no way barred or interfered with Petitioner's prosecution of this action, and she does not so contend. Indeed, the new third cause of action in her Amended and Supplemented Complaint charges general mismanagement of Curtis and, in support of that claim, cites the action taken by Curtis with respect to those contracts.

REASONS FOR DENYING THE WRIT

1. This Court Lacks Jurisdiction to Review the Judgment Below.

It is evident that no controversy exists or is threatened regarding the employment contracts with respect to which Petitioner seeks injunctive relief. Thus, this Court is not presented with a case or controversy and, for that reason, lacks jurisdiction to decide this cause. U. S. Const., Article III, Section 2; *California* v. *San Pablo & Tulare R. R.*, 149 U. S. 308; *Standard Oil Co.* v. *United States*, 283 U. S. 163, 181-2.

2. Petitioner Has Made No Showing of Irreparable Harm.

In order to be entitled to injunctive relief, Petitioner must show a threat of irreparable harm. *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500, 506-7; *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518, 561. Petitioner has not sustained this burden. The plain fact is she has not been prejudiced in any way. Her ability to prosecute this action has in no way been impaired. Moreover, she is free to attack the action which Curtis took with respect to the employment contracts, and she has, in fact, cited those actions in the Amended and Supplemental Complaint to support her claim of mismanagement.

3. The Decision is Patently Correct.

Petitioner contends that the actions taken by Curtis are subject to Rule 23(c) of the Federal Rules of Civil Procedure. The very words of the Rule clash with this contention. Unless a *"class action"* is sought to be *"dismissed or compromised"* the Rule is inapplicable. This conforms with the Rule's basic purpose of protecting the rights of the members of the class who do not appear in the proceeding but would be bound by any dismissal or settlement. See, *e.g., Webster Eisenlohr* v. *Kalodner,* 145 F. 2d 316, 320 (3d Cir. 1944); *Partridge* v. *St. Louis Joint Stock Land Bank,* 130 F. 2d 281, 286 (8th Cir. 1942); *Pelelas* v. *Caterpillar Tractor Co.,* 113 F. 2d 629, 633 (7th Cir. 1940); McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholders' Suit,* 46 Yale L. J. 421 (1937).

The actions taken by Curtis did not constitute a settlement of any of Petitioner's claims in her Complaint. Moreover, neither she nor any other stockholder was a party to the actions taken by Curtis and thus is not bound thereby. The petition suggests no valid reason why the plain meaning and basic purpose of Rule 23(c) should be ignored. Not one of the cases cited therein relates in the smallest degree to the scope or applicability of Rule 23(c); not one of the articles and speeches cited has anything to do with settling controversies which are not class actions.

While not entirely clear, Petitioner seems to suggest that Rule 23(c) has its roots in "ancient equitable principles" and that one of those principles would have required a settlement of a dispute other than a class action to be submitted for approval to a court in which a class action is pending. Even assuming Rule 23(c) has its roots in "ancient equitable principles", the Petition cites no support whatever for the novel proposition that one of those principles would have required Curtis to submit for approval

to the District Court any of the actions it took with respect to the employment contracts. The sole authority on which Petitioner relies, *Hawes v. Oakland,* 104 U. S. 450, contains merely dicta to the effect that a stockholder may sue in equity based upon a right of action existing in the corporation. Curtis does not dispute this but submits that it is entirely irrelevant.

At page 11 of the petition it is contended that the decision of the court below results in "an unwarranted dichotomy in the application of the Rule [23(c)]." It is argued that:

> "The plaintiff stockholder could not settle the corporation's claim against culpable officers and directors even with the consent of the corporation without judicial intervention and upon notice to stockholders, but the corporation itself could settle such claims out-of-court, free of such requirements."

But no such dichotomy exists. Contrary to the suggestion of Petitioner, a corporation could not settle a *class action* out-of-court, free of judicial approval. Where, however, the controversy being settled is *not* a class action, Rule 23(c) does not require either plaintiff or defendant to obtain prior court approval.

4. None of the Traditional Considerations for Granting Certiorari is Present in this Case.

The petition suggests no compelling reason for this Court to review the decision of the Court of Appeals, and no such reason exists.

1. The decision below is not in conflict with any decision of this Court.

2. The decision below is not in conflict with any other Court of Appeals decision.

3. The lack of importance of the questions raised is demonstrated by the complete lack of prejudice to Petitioner resulting from the actions taken by Curtis.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The respondent The Curtis Publishing Company has filed a brief in response to the Petition herein. None of the other parties have, so far as petitioner is informed, filed answering briefs.

This reply will, therefore, be directed to the points made in the Curtis brief.

1. This Court has jurisdiction. The issues raised below are not moot.

Although respondents Blair and Kantor were each paid substantial sums in settlement of their law suits against Curtis (commenced after this action), they are still parties to this action and subject to the jurisdiction of the Court. Respondent Culligan is still receiving and will continue to receive payments and valuable benefits under his employment contract although he is no longer in the Curtis employ. Respondent Clifford is still in the employ of Curtis and has received and will receive benefits which are challenged in this action. All of the parties are

subject to the jurisdiction of the Court since the basic issues alleged in the complaint have not yet been resolved.

The fact that a restraining order was denied by the District Court does not make the issue moot.

Mr. Justice Black wrote for this Court in *Porter* v. *Lee,* 328 U. S. 246, 251 [1946], in part, as follows:

> "It has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the status quo. Texas & New Orleans R. Co. v. Northside Belt R. Co., 276 U. S. 475, 479."

(See also *Porter* v. *Warner Holding Co.,* 327 U. S. 395, 399 [footnote 2], decided at the same Term. *Cf. Jones* v. *Securities and Exchange Commission,* 298 U. S. 1, 17-18 [1936].)

The cases cited to this point by the respondent are inapposite. *People* v. *San Pablo & T. R. Co.,* 149 U. S. 308 [1893], did not involve an appeal from the denial of an injunction. In that case, while an action brought by the State of California against a railroad company was pending in this Court on writ of error, the railroad company tendered to the state the amount of the taxes with penalties, interest and attorney's fee and costs of suit. This tender was not accepted but the railroad company deposited the money in the bank in accordance with Civil Code, Cal., § 1500, which declared that an obligation for the payment of money is extinguished by a due offer of payment if the amount is immediately deposited, in the name of the creditor, with some bank of deposit within the state, of good repute, and notice thereof is given to the creditor. This Court held that it must dismiss the writ of error when these facts appeared by admission of counsel in open court, as there was no longer any real controversy between the parties.

In *Standard Oil Co. (Indiana)* v. *United States*, 283 U. S. 163, 181-182 [1931], the Government sought to enjoin violations of Section 1 and Section 2 of the Sherman Antitrust Act (July 2, 1890, Ch. 647, 26 Stat. 209, 15 U. S. C. §§ 1, 2). The violation charged was an illegal combination to create a monopoly and to restrain interstate commerce by controlling, through 79 contracts concerning patents, that part of the supply of gasoline which was produced by the process of cracking. On the trial, the Government objected to a number of early Indiana company licenses which contained certain territorial restrictions on the production of cracked gasoline, and other provisions. At the hearing before the District Court, it appeared that these provisions had never been enforced. Upon the court's request, the objectionable clauses were voluntarily cancelled before the entry of the decree. Certain other contract provisions were questioned by the lower court. At its suggestion, these provisions were formally voluntarily cancelled by the parties. This Court held that under such circumstances the alleged validity of such provisions had become moot.

None of the circumstances which formed the basis of the decisions by this Court in the cited cases are present in the instant case.

2. Petitioner was not required to make a showing of irreparable harm.

The motion to restrain and enjoin the defendants from consummating the contemplated compromises with the culpable respondents was not an application for a preliminary injunction under Federal Rules of Civil Procedure, Rule 65(b). It was an application to the court in aid of its jurisdiction, to restrain and enjoin the parties from acting in violation of the requirements imposed by FRCP, Rule 23(c). It was so considered by the courts below, as well as by the respondents, who did not raise the question

of "irreparable injury" either in the District Court or in the Court of Appeals.

The question involved here is not one of discretion but of power. The question of statutory construction raised in the petition requires an interpretation by this Court of the meaning of Rule 23(c) and its applicability to the facts in the case at bar. If Rule 23(c) is applicable, then the District Court must order compliance with its provisions. As is clearly manifest from both opinions in the Court of Appeals, petitioner did not seek the interposition of the general equity power of the court, which rests in the sound discretion of the court, but relied on the power vested in the court by Rule 23(c). It is significant that Judge Waterman, in his concurring opinion below (348 F. 2d at p. 998) expressed the belief "that it would have been better judicial administration for the learned judge below to have granted a preliminary injunction restraining the corporation from settling, compromising or issuing releases," declaring that: "[T]hereby there would have been preserved for all parties the situation plaintiff was complaining of until final resolution of plaintiff's claim on their merits." But Judge Waterman agreed with Judge Friendly that the language of Rule 23(c) "does not specifically direct that the trial judge grant the preserving injunction plaintiff requested" (id).

While in *Beacon Theatres, Inc.* v. *Westover,* 359 U. S. 500 [1959], cited by respondent, Mr. Justice Black's opinion stated the general principle that "[T]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies" (at pp. 506-7), he was not dealing with a comparable situation but with a mandamus proceeding in which petitioner sought to mandamus a District Judge to vacate certain orders alleged to deprive petitioner of a jury trial. There is no comparable situation here.

3. The respondent makes no case for the correctness of the decision below.

The position we took below and contend for here, is that Curtis may not settle any claims asserted by the individual defendants against it which affect or may affect the claims asserted on Curtis' behalf in this action without submitting such settlement for consideration and approval by the District Judge, on notice to stockholders under Rule 23(c). We submit that that is the intent of the Rule. If the Rule were limited so that the corporation could settle the defendants' cross-claims without disposing of the claims alleged in the corporation's behalf in the derivative action, then such action would frustrate the very purpose and intent of this Court in promulgating the Rule. It places a premium on out-of-court settlements between the corporation (which refused to sue its culpable officers in the first place) and the culpable defendants.

In our reply brief in the court below, we called to the attention of the court facts and circumstances of public record which indicated the significance of the timely action we took to enjoin and restrain what thereafter transpired. They are important here to demonstrate the scope of the injury to Curtis, which we sought to prevent.

On October 1, 1964, respondents Kantor and Blair, then directors, officers and employees of Curtis, at a meeting of the Board of Directors, levelled certain charges of mismanagement against appellee Culligan, then President and Chairman of the Board, in effect the chief executive officer of Curtis. Kantor and Blair were thereafter dismissed as employees. Culligan first resigned as President and later resigned as Chairman of the Board of Directors (see New York Times, January 11, 1965).

On November 23, 1964, we moved below to enjoin and restrain Curtis from settling or otherwise disposing of the Culligan, Kantor and Blair claims against Curtis without

court approval on notice to stockholders, in view of the unresolved claims pending against them in this action. For, if petitioner is successful in this action, these Respondents will be required to account to Curtis for all damages sustained by Curtis as a result of the claims asserted in the complaint. Settling or otherwise disposing of the Culligan, Kantor and Blair claims by payments to them, with or without the exchange of general releases, would in effect result in whole or in part in a settlement of the claims asserted in this action.

The motion was argued below on December 10th and denied. The order was entered on December 16, 1964. From that order, the appeal was promptly taken.

On December 28, 1964, Curtis, Blair and Kantor issued a joint announcement reporting the "out-of-court settlement of their differences". It was stated "releases have been exchanged" (New York Times, January 1, 1965). The terms of the settlement were not disclosed. But in a proxy statement dated March 16, 1965 and submitted to the shareholders for the annual meeting of stockholders to be held on April 21, 1965, the following statements appear in connection with the settlement of claims effected by Curtis with Kantor and Blair, which settlement were sought to be enjoined below (proxy statement, p. 9):

> "Mr. Kantor and Mr. Blair left the employ of the Company on October 30, 1964 and resigned as directors on December 28, 1964. Subsequent to termination of their employment on October 30, 1964, Mr. Blair and Mr. Kantor commenced suit against the Company by Summons. Through their attorney, they claimed that they had been wrongfully discharged and alleged that under their employment contracts with the Company they were entitled to receive accrued deferred compensation aggregating $46,250 and sums in respect of unearned compensation for the balance of the terms of their contracts aggregating approximately $500,000. A settlement

> of the suit was effective December 28, 1964 pursuant to which each was to receive $75,000, $10,000 payable in 1964 and $65,000 payable in 1965. Mr. Blair also received $3,600 as reimbursement for business expenses incurred by him. Under the Settlement Agreement Mr. Blair and Mr. Kantor have agreed not to take voluntarily any action directly or indirectly injurious to the Company for a period of two years."

It appeared further from the proxy statement (at p. 11) that the 17,500 stock options in favor of Blair and the 30,000 stock options in favor of Kantor were terminated "by reason of termination of employment or by agreement with the employees" (*id*).

In connection with the termination of its employment agreement with Culligan, Curtis disclosed in the same proxy statement (at p. 7) that it took actions in settlement of Culligan's employment contract claims. Culligan vacated all his executive positions, resigned as a director and ceased all his executive and management activities for which compensation was provided in his employment contract which is the subject, in part, of this action. The proxy statement stated (*id.*):

> "The Company has an employment contract with Mr. Culligan which has been terminated effective January 16, 1966 (the Termination Date). Mr. Culligan will receive compensation through the Termination Date and for one year thereafter at the rate of $110,000 a year. Until the Termination Date Mr. Culligan will continue to perform certain services for the Company on special projects, including development of broadcasting opportunities for the Company. Under the contract, rights to deferred compensation will then have accrued to Mr. Culligan and he will be entitled to receive $22,093 a year for 10 years commencing with the Termination Date. Deferred compensation accrued during 1964 amounted to $50,484. The Company has agreed to and is maintaining $280,000 of insurance on Mr.

Culligan's life containing or subject to the following provisions: (1) Company ownership of the policies, (2) premiums payable by the Company and Mr. Culligan on a split-dollar basis, (3) designation of the beneficiaries by Mr. Culligan, with the Company to receive from the proceeds provided by a Fifth Dividend Option an amount equal to the cash value of the policies, and (4) a right in Mr. Culligan to purchase the policies for their cash surrender value upon leaving the Company's employ. During 1964 premiums on the policies amounted to $8,980, which were initially paid in full by the Company. Mr. Culligan repaid the Company $1,973 during 1964 being his share of that year's premiums. These policies are in addition to $240,000 of coverage provided to Mr. Culligan under the Company's Group Life Insurance Policy, described below at p. 13 and together therewith provide in excess of the $500,000 face amount of life insurance required by Mr. Culligan's employment contract. Mr. Culligan's contract also provides for the issuance of options for 50,000 shares of Common Stock of the Company. These options were issued to Mr. Culligan in 1962 at an option price of $6.8875 per share (95% of the fair market value on the date of grant). The options are now exercisable as to 60% of the shares covered thereby. On January 1, 1966, the options will become exercisable as to 80% of the shares covered thereby. Mr. Culligan's options will terminate 90 days after termination of his employment on January 16, 1966. None of these options has been exercised. Mr. Culligan holds additional options for 20,000 shares of Common Stock under the Company's Restricted Stock Option Incentive Plan."

Culligan will thus receive additional compensation of $220,000 for an additional two years, plus $220,000 in deferred compensation for an additional ten years. He will also have the benefit of $500,000 face amount of life insurance which is substantially paid for by Curtis. Before April 16, 1966 he may exercise options for 50,000 shares of Curtis stock. The option price is $6.8875 per share. The

closing market price on the New York Stock Exchange on February 26, 1965 was $10.50 per share (proxy statement, p. 10).

We have already argued in our petition that the historic thrust of Rule 23(c) is to bar settlements of claims, whether the settlement is effected by the stockholder plaintiff with the malefactors, or is accomplished by the beneficiary-corporation with the same malefactors, outside the framework of the derivative action and without consultation with the plaintiff.

Does Curtis suggest that the general releases may be impeached in this action? Does it also suggest that the large consideration which it has paid and agreed to pay to Culligan, Kantor and Blair may be the subject of a restitution decree in this action? If so, why effect the settlements outside the framework of this action? Since Curtis has concluded by its denials that it has no case against Culligan, Kantor and Blair upon the claims pleaded in this action, then it should have so urged before the courts below in support of its settlement with Culligan, Kantor and Blair. The plaintiff and the other stockholders would be afforded an opportunity, before the settlements had been consummated, to prove to the contrary. The settlements effected by Curtis with Culligan, Kantor and Blair can have meaning to these parties only if they were intended to be a bar to the prosecution by this plaintiff or by any other stockholder of any Curtis claims against Culligan, Kantor and Blair. Otherwise, Curtis could have sought to require Culligan, Kantor and Blair to plead their claims in this action, or moved to stay them from prosecuting their claims elsewhere until the disposition of the claims asserted against them here.

If the true intent of Rule 23(c) were to limit its applications to settlements only by the plaintiff in a derivative action, then the defendants, without the participation of the plaintiff, the other stockholders or the court, by their uni-

lateral acts, could, by settling non-pleaded cross-claims, extinguish the claims asserted in the complaint. This was the kind of conduct which was criticized by the late Chief Judge Clark in his opinion in *Certain-Teed Products Corporation* v. *Topping,* 171 F. (2d) 241 (2 Cir. 1948). The very point of the case was that *Topping,* the plaintiff in the Rhode Island derivative action, was faced with a *fait accompli* (a general release executed by the corporation to Brown, the defaulting officer). It is the sense of the court's opinion in *Topping,* as we read it, that where there is an unresolved derivative action pending, no action to settle the claims which may be involved therein may be taken by any of the parties without notice to stockholders and the approval of the court.

The precautions which the petitioner has taken by including a new third cause of action in her amended and supplemental complaint dealing with this conduct by Curtis (which amendment was made after the decision by the Court of Appeals below) should not preclude this Court from considering the important question which was raised by petitioner's motion in the District Court. If petitioner's view of the applicability of Rule 23(c) is sound, then the inclusion of the claim in the amended and supplemental complaint is irrelevant.

4. Traditional considerations for granting certiorari are present in this case.

The respondent is in error in suggesting that no compelling reason exists for this Court to review the decision of the Court of Appeals. Respondent's arguments 1 and 2 under this point are irrelevant because this is a case of first impression. It has never been directly ruled on by any other court.

We have already shown the importance of the question in our petition and in this brief, not only to this petitioner but generally, as a guide to the courts in their application of Rule 23(c) under like situations in the future.

CONCLUSION

For all of the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 581

MIRIAM J. WOLF,

Petitioner,

v.

CLAY BLAIR, JR., MATTHEW J. CULLIGAN, MILTON S. GOULD, MARVIN D. KANTOR and THE CURTIS PUBLISHING COMPANY,

Respondents.

REPLY BRIEF FOR RESPONDENT, THE CURTIS PUBLISHING COMPANY, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1965

MIRIAM J. WOLF, *Petitioner,* v. CLAY BLAIR, JR., MATHEW J. CULLIGAN, MILTON S. GOULD, MARVIN D. KANTOR and THE CURTIS PUBLISHING COMPANY, *Respondents.*	No. 581

REPLY BRIEF FOR RESPONDENT, THE CURTIS PUBLISHING COMPANY, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

This brief is respectfully submitted on behalf of Respondent, The Curtis Publishing Company ("Curtis"), in order to correct the record as to certain allegations of fact contained in Petitioner's reply brief and to answer the arguments made therein.

1. Petitioner's Factual Errors.

Petitioner's reply brief attempts to supplement the Record which she made herein by narrating "facts and circumstances of public record" (Br. 5-9). Most of the purportedly factual matters discussed there are neither facts contained in the Record nor facts of public record;

they are instead newspaper reports which are erroneous or misleading in key aspects. The most significant example is Petitioner's assumption, based on a story in The New York Times, that general releases were given by Curtis to Respondents Blair and Kantor in connection with the settlement of their action against Curtis for alleged breach of their employment agreements (Br. 6, 9). The fact is that Curtis gave Blair and Kantor releases which specifically provided that they "shall have no application in respect of any claim asserted in the presently pending derivative action brought by Miriam J. Wolf". Petitioner also assumes that Curtis gave a general release to Respondent Culligan in connection with its termination of his employment agreement, but in fact Curtis gave no release whatever to Culligan. It is thus clear that Curtis has done nothing which would interfere with Petitioner's prosecuton of this action.

2. Petitioner's Legal Contentions Are Unsound.

Petitioner's reply brief repeatedly and mistakenly asserts that something Curtis did had the result of extinguishing the claims asserted in her complaint. Curtis' position can best be expressed by its answers to the three specific questions posed at page 9 of Petitioner's reply brief.

Petitioner asks, "Does Curtis suggest that the general releases may be impeached in this action?" Our answer is, "No general releases or other releases relating to claims asserted in Petitioner's class action were given."

Petitioner asks, "Does [Curtis] also suggest that the large consideration which it paid and has agreed to pay to Culligan, Kantor and Blair may be the subject of a restitution decree in this action?" Our answer is, "If, under the original Complaint in the action, the court finds that the employment agreements, which were the subject of the

disputes with these three Respondents, contained improper provisions, the court would have the same power to order restitution as it would have had if Curtis had taken no later action whatever with respect to those agreements."

Petitioner asks, "If so, why effect the settlements outside the framework of this action?" Our answer is, "The settlements it made were not effected within the framework of this action because they were not settlements of this action. They were resolutions of other disputes not encompassed within Petitioner's original Complaint."

It is argued that the inclusion of a new third cause of action in Petitioner's Amended and Supplemental Complaint dealing with the settlements Curtis made should not preclude this Court from hearing the issues raised by her petition. She argues that if her contention as to the scope of Rule 23(c) is sound the inclusion of the new cause of action is "irrelevant" (Br. 10). But this new cause of action is not irrelevant. Since Petitioner has now raised issues regarding those settlements, there is no need for this Court to pass upon the scope of Rule 23(c).

By her motion, Petitioner sought to enjoin Curtis from taking any action which would have constituted a settlement of her class action in violation of Rule 23(c). Curtis took no such action. None of the actions it took violated Rule 23(c) because none of them had any effect on the ability of Petitioner to prosecute her class action, and, unlike the cases cited on page 2 of Petitioner's reply brief, no action was taken until after the District Court denied Petitioner's motion on the merits. Since no controversy is now pending or threatened between Curtis and Culligan, Blair or Kantor, Petitioner's contentions are clearly moot.

CONCLUSION

For all of the foregoing reasons and for all of the reasons stated in Curtis' main brief, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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